

United States Circuit Court of Appeals

For the Ninth Circuit 6

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST
COMPANY (a corporation),

Appellants,

VS.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUN-
CILL, TIM HARRIGAN, FRANKLIN ADREAN, JR.,
FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTIMEN, WILL-
IAM H. CRAWFORD, J. B. HUGHES, WALTER S.
AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON,
W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES
V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN
LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GAR-
FIELD and D. W. DAVIS,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco,

*Proctors for Appellants
and Petitioners.*

OSCAR SUTRO,
FELIX T. SMITH,
Standard Oil Building, San Francisco,
Of Counsel.

FILED

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F. D. MONCKTON,

IN THE

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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

We earnestly believe that the decision of the court in this case is based upon a misapprehension of a fundamental point of fact. We, therefore, respectfully petition for a rehearing of these appeals.

In this court's statement of facts it is said, "Wages calculated to March 15th aggregated \$10,395.83". Gerber tendered as wages only \$5,609.20, while offering to pay additional sums as costs, transportation, etc. On the assumption of fact made by this court, therefore, this tender was insufficient and the whole first point made in our brief, accordingly, was determined against us.

As a matter of fact, however, it is clear from the record and implied in the interlocutory decree that, while the libel demanded \$10,395.83 as wages calculated to March 15th, this was largely in excess of the actual amount of wages due on that date. The interlocutory decree sets forth the total amounts of wages due libelants to March 17th; the aggregate of these amounts is, *not* \$10,395.83, *but* \$5,551.07, which is less than the amount of wages tendered by Gerber. Gerber, therefore, tendered more than was actually due in any way, except the penalty claimed by libelants under R. S. 4529. At the time the tender was made, there was respectable authority for Gerber's position that he was not liable for this penalty. There was, therefore, "sufficient cause" for failure to tender the penalty. If Gerber had tendered the additional sums claimed as penalty and libelants had accepted them, he could never have litigated the question of the applicability of the penalty so as to recover these sums from libelants. The only possible way he could have preserved his right to litigate the applicability of the penalty was to follow the course which he adopted.

We respectfully submit, therefore, that our first point (Appellants' Brief, p. 17; Appellants' Supplemental Brief, p. 5; Appellants' Memorandum, p. 8) should have been resolved in our favor, and the authorities therein cited (*Vincent v. United States*, 272 Fed. 889, Appellants' Supplemental Brief, p. 5; Appellants' Memorandum, p. 8, and *Pacific Mail Steamship Company v. Schmidt*, 241 U. S. 245, Appellants' Brief, p. 19; Appellants' Supplemental Brief, p. 6; Appellants' Memorandum, p. 9) should have been followed. As Mr. Justice Holmes said in the latter case:

“Even on the assumption that the petitioner was wrong it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is ‘neglect * * * without sufficient cause’. The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young*, 209 U. S. 123.”

For these reasons it is respectfully submitted that a rehearing should be granted in this cause.

Dated, San Francisco,

February 23, 1922.

PILLSBURY, MADISON & SUTRO,

*Proctors for Appellants
and Petitioners.*

OSCAR SUTRO,

FELIX T. SMITH,

Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 23, 1922.

FELIX T. SMITH,
*Of Counsel for Appellants
and Petitioners.*